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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In The Matter of)
)
Amendment of Section 73.202(b)) MM Docket No. 93-229
Table of Allotments) RM-8296
FM Broadcast Stations)
(Panacea, Quincy and Midway,)
Florida))

TO: Chief, Allocations Branch
Mass Media Bureau

COMMENTS ON COUNTERPROPOSAL

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COMMENTS ON COUNTERPROPOSAL

Catamount Communications, Inc. ("Catamount"), licensee of FM station WHKX, Lafayette, Florida, by its counsel, hereby submits comments on the Counterproposal filed by Bitner-James Partnership ("BJP") on September 27, 1993, requesting the Commission to, inter alia, substitute Channel 264C3 for Channel 264A at Quincy, Florida, change the community of license to Midway, Florida, and modify the permit of station WTPS accordingly. The Commission should reject BJP's Counterproposal for the following reasons.

INTRODUCTION

BJP describes itself as the permittee of FM station WTPS, Channel 264A, Quincy, Florida, and technically it is, but as discussed infra, significant questions exist as to the status and control of the permit. BJP filed its counterproposal to upgrade WTPS and change its community of license in response to a Notice of Proposed Rule Making ("NPRM"), 8 FCC Rcd 5257 (1993), in which the Commission proposed to allot Channel 263A to Panacea, Florida, as requested in a petition filed by EME Communications ("EME").^{1/} The Commission gave public notice of BJP's Counterproposal on April 20, 1994 (Report No. 2006).

The Commission should deny or dismiss BJP's Counterproposal for several reasons. The expiration date of the WTPS construction permit has passed, and despite a pending application for extension, the Commission has not extended the permit. Thus, there is no

^{1/} In Reply Comments, Clyde Scott, Jr., d/b/a EME Communications, stated that he was withdrawing his support for Channel 263A or Channel 237A (an alternate channel which BJP proposed) at Panacea, but also stated that should the Commission allot Channel 237A at Panacea, he would apply for a construction permit and build the station.

permit for WTPS which the Commission may modify as BJP requests. Further, documents from the Commission's files for WTPS raise significant questions concerning BJP's partnership status, prior unauthorized transfers of control of BJP, whether principals of BJP have misrepresented facts to the Commission, whether BJP violated Section 1.65 of the rules, and thereby whether BJP or its current principals have the basic qualifications to hold the WTPS permit or construct the station.

THE COMMISSION CANNOT UPGRADE AN EXPIRED PERMIT

WTPS is an unbuilt station. The construction permit for WTPS, granted July 23, 1991, expired September 29, 1993, two days after BJP filed its Counterproposal. On that expiration date BJP filed its second application to extend the WTPS permit (File No. BMPH-930929JG), having already received a prior extension until September 29, 1993. The second extension application, which remains pending, failed to comply with 47 C.F.R. Section 73.3534-(a), which requires the filing of such applications at least 30 days prior to the expiration date when the facts supporting the extension request are known in time to permit such filing. In the case of WTPS, the facts submitted in support of BJP's second extension application are essentially the same as set forth in its first application (File No. BMPH-921207JD), and were plainly known more than 30 days prior to the September 29, 1993, expiration date.^{2/}

^{2/} BJP made no showing in its extension application why it waited until the expiration date to file.

Thus, the WTPS construction permit expired on its own terms more than seven months ago. Absent a valid and existing construction permit, the Commission cannot consider BJP's Counterproposal, upgrade the Quincy channel allotment or change its community of license. 47 C.F.R. Sections 1.420(g) and (i) permit a channel upgrade or community of license change only for an FM permit or license. See Santa Margarita and Guadalupe, California, 2 FCC Rcd 6930 (MM Bur. 1987) (subsequent history omitted).

BJP has failed to construct WTPS for more than 33 months. Further, BJP waited 26 months after the permit was first granted, until after the original permit expiration date and two days before the extended expiration date, before submitting its upgrade proposal. Compare, Gladstone, Michigan, 4 FCC Rcd 6683 (MM Bur. 1989) (upgrade proposal granted when filed at the earliest time possible). BJP does not set forth any of this relevant information in its Counterproposal other than two brief references that WTPS is unbuilt. The history of the WTPS permit demonstrates that BJP has been unable to construct the facility for almost three years, and there is no reason to expect that it will be in a position to do so any time soon. As it now stands the WTPS construction permit has expired, and until and unless the Commission grants BJP's untimely extension application, BJP's Counterproposal is not eligible for consideration.

BASIC QUALIFICATIONS ISSUES EXIST CONCERNING BJP

A review of BJP's extension application, as well as a pending application for assignment of the WTPS permit and related filings

reveals that significant questions exist regarding BJP's qualifications and whether the Commission will reinstate or extend the WTPS permit. In addition to the second BJP application to extend the permit, on July 2, 1993, BJP filed an application to assign the permit to Leah and John James (BAPH-930702GK). Leah James was an original 49% general partner of BJP, along with Monte R. Bitner, who was its 51% general partner. John James, an attorney, is the husband of Leah James. Mr. Bitner has objected to the assignment of the WTPS permit to the James in a letter received at the Commission on August 13, 1993, and he previously objected to the grant of the first extension of the WTPS permit.^{3/} On March 29, 1994, the Commission directed BJP to provide additional information with respect to the pending extension and assignment applications within 30 days. As of this date Catamount is unaware of any response by BJP.

A. UNAUTHORIZED TRANSFERS OF CONTROL

^{3/} Mr. Bitner objected to the first extension of the WTPS construction permit on April 5, 1993. However, the Commission had granted the application on March 29, 1993, based on BJP's representations in the application concerning the loss of BJP's transmitter site and the bankruptcy of Mr. Bitner. By letter dated May 4, 1993, the Commission acknowledged Mr. Bitner's objection, decided not to vacate the earlier grant, but requested BJP to provide additional information concerning the status of 1) the partnership in light of Mr. Bitner's bankruptcy and 2) the construction permit. The Commission also directed BJP to file immediately a Form 316 application (emphasis in original) if control of BJP had changed as a result of the bankruptcy. It is unclear from the Commission's files whether BJP ever responded directly to the Commission's May 4 letter, though it did file a Form 316 application on June 25, 1993, and an application to assign the permit to the James on July 2, 1993.

Documents on file with the Commission reflect that two unauthorized transfers of control of BJP have occurred. The first resulted from Mr. Bitner filing for personal bankruptcy on April 8, 1992, and the appointment of a trustee shortly thereafter.^{4/} BJP never reported Mr. Bitner's bankruptcy until its first application to extend the WTPS construction permit, filed December 7, 1992 (File No. BMPH-921207JD), executed by Leah James. Although noting Mr. Bitner's bankruptcy, and Mrs. James' efforts to acquire Mr. Bitner's interest in the partnership through negotiations with the Bankruptcy Trustee, BJP did not report that the trustee had actually taken control of Mr. Bitner's majority interest in BJP. BJP did not report or seek approval of the trustee's acquisition of Mr. Bitner's interest until it filed a Form 316 application on June 25, 1993, more than 14 months after Mr. Bitner filed for bankruptcy, and more than seven weeks after the Commission's May 4, 1993, letter directed BJP to file such an application immediately if a transfer of control had occurred.^{5/} See File No. BTCH-930625GR.

On May 11, 1993, before BJP ever reported the trustee's involvement, the trustee sold the 51% interest in BJP to the James. BJP did not file an application for prior Commission consent to

^{4/} Although the Commission's files do not reflect the date of the trustee's appointment, there is a "Proceeding Memo for 341 Meetings" reflecting a May 5, 1992, meeting among the trustee, the debtor, and certain creditors, including John James representing his wife, Leah James. Therefore, the trustee was apparently appointed sometime between April 8 and May 5, 1992.

^{5/} The Commission sent its May 4, 1993, letter to the James' address listed in BJP's December 7, 1992, application to extend the WTPS permit.

this transaction until almost two months after the James acquired the controlling interest in BJP. See File No. BAPH-930702GK. This is the assignment application now pending and which, along with the pending extension application, are the subject of the Commission's March 29, 1994, inquiry. Thus, the James now have full ownership of BJP, a major change in its ownership which the Commission has never approved, and which BJP did not voluntarily report.

B. MISREPRESENTATION OR LACK OF CANDOR

Beyond acquiring unauthorized control of the WTPS construction permit, it appears the James may also have misrepresented certain matters to the Commission. In the Commission's March 29, 1994, inquiry letter it states "[w]e note that the subject 314 application, as supplemented, is not fully responsive to issues raised concerning possible misrepresentation to the Commission by the instant parties." The Commission also questioned whether BJP's possible reporting failures constitute a violation of 47 C.F.R. Secion 1.65.^{6/}

^{6/} The basis of the Commission's inquiry, at least in part, concerns the James representations concerning other broadcast interests. In the pending assignment application, the James state they have no other broadcast interests, though they do note pending litigation concerning "a claimed right of interest" in WGWD(FM), Gretna, Florida, further stating they are not exercising any rights of ownership or management over WGWD. See BAPH-930702GK. However, in the complaint which the James signed as plaintiffs, and which Mr. James also signed in his capacity as plaintiff's attorney, the James state, among other things, that they have a 46.06% partnership interest in the licensee of WGWD, and that Mr. James has "been actively engaged in operating the subject property" since some point in 1989. See Commission letter dated March 29, 1994; "Petition" of John L. James and Leah R. James attached to letter from Monte Bitner to FCC received August 13, 1993 (written as a Petition to Deny the assignment of the WTPS permit to the James).

There are other indications of potential misrepresentations or possible lack of candor by BJP or the James. For example, in BJP's Counterproposal it reports that its proposed upgrade would result in a service area population increase of 147,792 persons. This calculation was presumably based on the coverage difference between the facilities specified in the original WTPS permit and BJP's proposed Class C3 upgrade operating from the proposed reference coordinates.^{2/} However, when BJP filed its Counterproposal it knew full well that the site authorized in the WTPS permit was no longer available, having first reported so in its December 1992 application to extend the permit. Indeed, in footnote 3 to its Counterproposal BJP reported the loss of this site, and went on to state that "a new transmitter site has been negotiated and an application is to be filed by the new entity shortly."^{3/}

On October 27, 1993, BJP filed an application specifying a new transmitter site and a proposed Class A facility with a service area encompassing 219,310 persons. See File No. BPH-931027IB. This represents a significant increase over the population within "the current Class A coverage area" stated in BJP's Counterproposal, and diminishes significantly, from 147,792 to 27,033, any

^{2/} It is unclear whether BJP's purported population increase is accurate. BJP states that its "current Class A coverage area includes 98,551 persons." Counterproposal, page 4. In BJP's original construction permit application (File No. BPH-870227ME), it reported that its proposed 60 dBu coverage area had a population of 120,702. Using this data results in a population increase of 125,641.

^{3/} It is not clear who or what is the referenced "new entity."

population increase which would result from the proposed upgrade.^{9/} BJP knew the location of its new site for WTPS when it filed its Counterproposal^{10/} and presumably knew that a Class A facility at that site would reduce significantly the service benefits BJP claimed for its proposed upgrade. BJP's failure to mention any of these relevant facts in this proceeding calls into question its candor.

This is not an insignificant omission. When BJP filed its Counterproposal it presumably had no idea whether any other counterproposals would be filed, or how EME would respond to BJP's Counterproposal. It was, therefore, important for BJP to attempt to maximize the benefits it could show from its Counterproposal in the event it was subject to conflicting proposals and comparative evaluation.

Thus, on a number of serious matters, including the ownership of BJP, other broadcast interests of the James, the purported benefits of BJP's counterproposal, and its ability to implement its counterproposal, questions exist concerning the veracity of BJP's representations to the Commission. This is in addition to the thus far undisputed unauthorized transfers of control of BJP. It cannot be said that these are innocent mistakes made by persons unaware of

^{9/} BJP subsequently informed the Commission that the site specified in its October 27, 1993, modification application was no longer available, and on March 30, 1994, amended the application to specify a new site. The population coverage from the Class A facility specified in that amendment is 217,097, only slightly less than the coverage first proposed.

^{10/} "A new transmitter site has been negotiated" Counterproposal, footnote 3.

the requirement to be candid and truthful in their representations to the Commission -- Mr. James is an attorney.

C. IMPACT OF QUALIFICATIONS ISSUES ON BJP'S COUNTERPROPOSAL

These matters involve basic qualifications issues which the Commission cannot ignore in the context of this proceeding. BJP's construction permit for WTPS has expired, and in the absence of a valid permit the Commission cannot consider BJP's Counterproposal. The issues raised demonstrate that significant questions exist whether BJP or Leah and John James are qualified to even possess a construction permit, let alone whether circumstances exist warranting yet a further extension of the WTPS permit.^{11/}

If BJP's application to extend the WTPS construction permit is not granted, Channel 264A at Quincy will become vacant. This has particular significance in the context of this proceeding. First, it will moot BJP's stated intention to implement its counterproposal because no party will exist to implement any changes to the allotment. Second, there is no other expression of interest in the proposed upgrade or community change to Midway. Such an expression of interest is a precondition for any proposed allotment, and in the absence thereof the Commission will not make an allotment. See e.g., Woodsville, New Hampshire, 6 FCC Rcd 609 (MM Bur. 1991).

^{11/} It is assumed, consistent with prior Commission practice, that the Commission will not grant an extension of the WTPS construction permit unless it also determines that the James have the requisite qualifications to possess the permit, and conversely, the Commission will not grant the assignment application if it determines no valid basis exists to extend the permit.

If the Commission does not grant the application to assign the permit from BJP to the James, BJP will similarly not be able to implement its counterproposal. The James will have been denied ownership or control of the permit. BJP's original majority partner, Mr. Bitner, no longer has an interest in BJP and, in view of his recent bankruptcy, there is no indication that even if he did he or BJP could construct WTPS.

CONCLUSION


The Commission's ability to make any changes to the Quincy Channel 264A allotment is therefore contingent on the existence of a valid and existing construction permit for WTPS, a condition which does not now exist, and the assignment of the permit to the James. The serious issues outstanding concerning the James' basic qualifications, some of which are already the subject of a Commission inquiry, raise a significant question whether these preconditions will ever exist. As it now stands they do not, and the Commission must deny or dismiss BJP's Counterproposal.

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Respectfully submitted,

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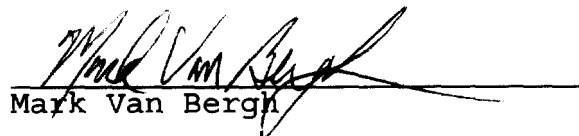
CERTIFICATE OF SERVICE

I, Mark Van Bergh, do hereby certify that true copies of the foregoing were sent May 5, 1994, by first-class United States mail, postage prepaid, or as indicated by hand to the following:

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